No. 91-502

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PATRICIA M. ECKERT, G. MITCHELL WILK, JOHN B. OHANIAN, DANIEL WM. FESSLER, NORMAN D. SHUMWAY, NEAL J. SHULMAN, and WILLIAM R. SCHULTE,
Petitioners,

v.

FEDERAL EXPRESS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF PETITIONERS

Of Counsel:
JAMES T. GRADY
General Counsel
JAMES A. MCCALL
Associate General Counsel
THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 Louisiana Avenue, N.W.
Washington, D.C. 20001

November 22, 1991

STANLEY O. SHER *
MARC J. FINK
SOVAIDA MA'ANI
SHER & BLACKWELL
1255 Twenty-Third St., N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2990
Counsel for Amici Curiae

* Counsel of Record

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF PETITIONERS

The Applicant, the International Brotherhood of Teamsters ("IBT"), respectfully moves this court for leave to file the attached amicus curiae brief in support of the petition for the issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The written consent of the Petitioner has been obtained and a copy thereof is being provided to the Court together with Applicant's Motion and Brief. Counsel for the Respondent, however, has refused to consent

to the filing of a brief by the IBT as amicus curiae. No reason or rationale whatsoever for this refusal was provided and repeated telephone calls to Respondent's counsel to discuss the matter and thereby perhaps avoid the filing of this motion, have been unanswered.

Affiliates of the IBT represent the interests of hundreds of thousands of motor carrier employees who are directly and adversely impacted by the Ninth Circuit's decision in this case. The IBT thus has a significant interest in this proceeding. The Applicant's brief will be of considerable assistance to the Court. Among other things, the IBT brief will discuss the major consequences which the Ninth Circuit's decision could have both on state regulation of motor carriers throughout the United States and on the labor laws which govern the relationship between those motor carriers and their employees. The IBT is in a unique position to discuss these important considerations and, unless the IBT's brief is permitted to be filed, they will not be brought to the attention of the Court. The IBT's brief will not broaden the issues presented; instead it will provide the Court with the important concerns of the people who may be most affected by the Ninth Circuit's decision.

Respondent has offered absolutely no reason for why the Court should be deprived of the assistance of this brief. Respondent's refusal to grant consent appears to be due solely to its view that its economic self interest would best be served by denying the Court the benefit of the views of the IBT. Such an arbitrary and narrow self-interest is no basis for depriving the IBT of the opportunity to participate in a proceeding which is of critical importance to its membership and to the motor carrier industry in general.

For the foregoing reasons, the IBT respectfully requests that its motion be granted and its amicus curiae

brief in support of the petition for certiorari be filed in this proceeding.

Respectfully submitted,

STANLEY O. SHER *
MARC J. FINK
SOVAIDA MA'ANI
SHER & BLACKWELL
1255 Twenty-Third St., N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2990
Counsel for Amici Curiae

* Counsel of Record

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BRIEF AMICUS CURIAE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

The federal question presented in this case is the scope of the following preemption language set forth in the Airline Deregulation Act of 1978:

> Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and

> effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. App. § 1305(a)(1) (1991).

On June 25, 1991, the United States Court of Appeals for the Ninth Circuit rendered a decision in the case of *Federal Express Corp. v. California Public Utils. Comm'n*, 936 F.2d 1075 (9th Cir. 1991), that expanded the scope of this statutory provision considerably beyond the express and clear intent of Congress. The Circuit Court held that not only did the section preempt state regulation of those functions of an air carrier relating to the provision of air transportation, but that its preemptive scope extended to cover intrastate trucking activities of an entity that happened to be an air carrier even when those trucking activities were not part of any air transportation service.

The Circuit Court's decision has effectively opened the door for any entity that can demonstrate that it qualifies as an air carrier by virtue of the fact that it operates one or more aircraft as part of its business, to shirk state regulation of all its activities, including its intrastate motor carrier activities, regardless of how unrelated and remote such activities may be from the provision of air transportation. The ultimate result of such a decision is that all businesses that can identify themselves as being air carriers have been singled out for more favorable treatment than that accorded other businesses in that they alone are exempt from having to adhere to and comply with the requirements associated with state regulation of their activities.

Air carriers have thus been accorded a blanket competitive advantage over all other businesses and, in particular, over other motor carriers engaged in intrastate trucking.

INTEREST OF AMICUS CURIAE

The International Brotherhood of Teamsters ("IBT"), is concerned with the anticompetitive and adverse economic effects of the Circuit Court's decision. Affiliates of the IBT act as the collective bargaining representatives for hundreds of thousands of workers in the motor carrier industry. As such, the IBT has a vital interest in any matter which may impact the economic viability of motor carriers and the terms and conditions of employment provided by them.

The improper deregulation of a part of the motor carrier industry in a state such as California, which is a direct consequence of the Ninth Circuit's decision, will have a direct impact on the economic condition of numerous motor carriers. For example, Federal Express will now be in the enviable position of being treated more favorably than the other 23,000 odd motor carriers engaged in intrastate trucking in California. Alone, out of all these motor carriers, Federal Express' trucking operations will not be subject to economic regulation by the state even though it transports approximately 200,000 packages entirely by ground and within the boundaries of California on a weekly basis. CR 46, Ex. 1, p. 9.[1]

Among the advantages that will accrue to the benefit of Federal Express will be the ability to, without public notice, change its rates, provide discounts and make private undisclosed agreements with targeted customers. This will afford Federal Express competitive opportunities that are denied its competitors who must comply with state regulation. Moreover, Federal Express will also be able to avoid payment of operational fees to California thus relieving it of monetary obligations to which its competitor motor carriers are subject.

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[1] As herein used, "CR" refers to the Clerk's Record in the Court of Appeals for the Ninth Circuit.

The combination of increased competitive opportunities for Federal Express and a decreased financial burden will result in severe competitive and economic disadvantage to the many competitors of Federal Express. These companies employ thousands of workers, a large number of whom are members of IBT affiliates. Since any negative economic situation experienced by these companies inevitably impacts their employees, the IBT has a strong and vital interest in seeking to eliminate the adverse economic result created by the misguided decision of the Ninth Circuit.

Moreover, the likelihood is great that Federal Express, emboldened by the Ninth Circuit's decision, will seek to extend this economic preference to its intrastate motor carrier services in other states. Indeed, other companies likely will follow the Federal Express lead and seek to avoid state regulation of their wholly intrastate motor carrier service by portraying themselves as air carriers. Not only will this further adversely affect the employees represented by IBT affiliates, but it also will lead to extensive and unnecessary litigation.

In this regard, it is virtually certain that states will seek to preserve their rightful regulatory roles and courts will be required to resolve the ensuing disputes. Only the intervention of this Court can prevent the proliferation of numerous lawsuits concerning the preemptive reach of section 1305(a)(1) of the Airline Deregulation Act, 49 U.S.C. App. § 1305(a)(1), with regard to intrastate motor carrier service. Indeed, judging from the existing cases construing section 1305(a)(1) in other contexts, lower courts will reach conflicting views with regard to whether and to what extent intrastate motor carrier regulation is preempted and this Court will at some point be required to resolve the matter. Rather than allowing such chaos and confusion to occur, this Court should act now and grant the petition.

IBT's interest is further enhanced by the fact that the Ninth Circuit's decision will have ramifications in the labor law area. In particular, the decision throws into question the determination of the appropriate statutory scheme which is to govern the management-labor relations of the component parts of a business that operates aircraft in any one segment of its operations. Thus, companies which operate aircraft in any part of their business operations may now claim that, in light of the Ninth Circuit's decision, they are to be regarded as air carriers with "integrated" operations and that therefore the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, *et seq.* applies to their employees engaged in ground operations as opposed to the currently applicable National Labor Relations Act ("NLRA"). 29 U.S.C. §§ 151, *et seq.* The RLA is applicable to airlines and, unlike the NLRA, provides for a system-wide bargaining unit thereby making it more difficult to secure union representation. In any event, the Ninth Circuit's decision will create uncertainty in this area of labor law where none now exists. This disruption of well established labor law principles is of significant interest to the IBT.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION FINDING PREEMPTION IS MANIFESTLY ERRONEOUS AND CONTRARY TO THE STATUTE

It is well established that federal preemption not be presumed absent a clear manifestation of Congressional intent. *California Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987); *Wardair Canada v. Florida Dept. of Revenue*, 477 U.S. 1, 6 (1986); *Louisiana Pub. Serv. Comm'n v. Federal Communication Comm'n*, 476 U.S. 355, 369 (1986); *De Canas v. Bica*, 424 U.S. 351, 359 (1976); *New York Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 413 (1973); *United States v. Smith*, 725 F. 2d 852, 859 (1st Cir. 1984), *cert. denied*, 469 U.S. 841 (1984). Such Congressional intent may be evinced either

expressly by the language of the statute or, in appropriate circumstances, may be implied. As will be shown, no such express or implied intent can be found with regard to federal preemption of state regulation of intrastate motor carrier transportation which is not part of an air transportation service.

A. No Express Preemption

Section 1305(a)(1) of the Airline Deregulation Act does not provide expressly for federal preemption of state regulation of the motor carrier services of an airline. As noted, the wording of the section provides that it preempts state regulation only of "air transportation." 49 U.S.C. App. § 1305(a)(1). Such transportation is defined in 49 U.S.C. § 1301(10) as "interstate, overseas, or foreign *air* transportation . . ." (Emphasis added). No mention whatever is made of motor carrier service provided by an airline. Had Congress intended to expressly preempt all motor carrier services provided by an airline it could have said so. An examination of the legislative history of the section further reveals a singular lack of reference to ground transportation. H.R. Rep. No. 1211, 95th Cong., 2nd Sess. 15-16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3751-52; H.R. Conf. Rep. No. 1779, 95th Cong., 2nd Sess. 94-95, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3773, 3804-5; H.R. Rep. No. 793, 98th Cong., 2nd Sess. 147, *reprinted in* 1984 Code Cong. & Admin. News 2857, 2857-2873; H.R. Conf. Rep. No. 1025, 98th Cong., 2nd Sess. 13-21, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2874, 2874-2882.

The Ninth Circuit's decision ignores this clear statutory language. To the contrary, the Circuit Court distorts the proper scope of federal preemption provided for in Section 1305(a)(1) by arrogating to Congress the intent to preempt states from regulating virtually all the activities of an air carrier operating within their boundaries, including its intrastate trucking activities, even though such

activities are not part of the carrier's air transportation operation. There is no basis in the statutory language or the legislative history for finding that Congress had such a wide reaching preemptive intent in enacting Section 1305(a)(1). The terms of this section make clear that states only were to be preempted from regulating the rates, routes or services of an air carrier in providing air transportation.

The Ninth Circuit erroneously concluded that state regulation of intrastate motor carrier rates and services were preempted because such motor carrier rates and services were somehow related to an integrated air transportation. This rationale, however, goes far beyond the express statutory language and preempts state regulation of activities which are far removed from air transportation. Thus, the intrastate rates and services of Federal Express which were found to be preempted from state regulation pertained to the transportation of packages which had nothing to do with air service; indeed, the packages were moved wholly by motor carriers and never saw the inside of an airplane.

Effectively, the Ninth Circuit's decision means that activities of an air carrier which are not part of air transportation are exempt from state regulation merely by virtue of the fact the activity is performed by an air carrier. This is a manifest distortion of the statutory language.

B. No Implied Preemption

It is equally clear that Congressional intent to preempt state regulation of the instrastate motor carrier services of an airline cannot be implied. To conclude that there is implied preemption, it must be found that the scheme of regulation is so comprehensive as to lead to the reasonable inference that Congress "left no room" for supplementary regulation, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or that the federal in-

terest is so dominant as to preclude enforcement of state laws on the same subject. *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). No such finding can be made here.

Again, the legislative history of section 1305(a)(1) demonstrates that in enacting this section Congress was preempting states only from regulating airline transportation services. Congress wanted to ensure that states did not regulate in the area of airline routes, rates, and services which it had chosen to deregulate. Indeed, Congress' purpose in enacting the Airline Deregulation Act of 1978 was to encourage competition among the airlines by extricating the federal government from the business of economic regulation of airlines. Whereas prior to 1978, the federal government had rigidly controlled the rates, routes, and services an airline could offer, the Airline Deregulation Act was intended to put an end to this control and thus encourage competition and lower prices among airlines. 49 U.S.C. § 1302(a)(3)(1991); *see also* H.R. Rep. No. 1211 95th Congress, 2nd Sess. 15-16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3773. Section 1305(a)(1) of the Airline Deregulation Act was intended to ensure that no state or local governmental entity could step in and fill the regulatory void which Congress had intentionally created. *See* 123 CONG. REC. 30,595 (1977); Pub. L. No. 95-504, 92 Stat. 1705 (1978).

The purpose of section 1305(a)(1) will not in any way be thwarted or threatened by state regulation of the intrastate motor carrier activities of airlines which are not part of their air transportation services. Here, for example, California is seeking only to regulate the transportation of packages by motor carriers which are not part of any through air transportation. As noted, these packages move exclusively by truck between points within the borders of California and never see the inside of an airplane. It is not possible, the IBT submits, to conclude that such state regulation could have any adverse affect

on the competitiveness of the routes, rates or services of airlines. Accordingly, California's limited regulation of Federal Express' intrastate motor carrier service cannot be found to violate the preemptive statutory scheme constructed by Congress.

It is important to note that the area of motor carrier regulation is one that states have traditionally occupied. This regulation is perceived by California and other states as being in the public interest and providing for the health and safety of its citizens. In such circumstances there is a strong presumption against finding preemption of state law. *California v. Federal Energy Regulatory Comm'n*, 110 S.Ct. 2024, 2029 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *West v. Northwest Airlines, Inc.*, 923 F.2d 657, 659 (9th Cir. 1991) (citing *California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989)).

C. The Ninth Circuit Confused Commerce Clause Analysis With Preemption

Before the district court and the Ninth Circuit, Federal Express argued that state regulation of its intrastate motor carrier services excessively burdened interstate commerce and should thus be prohibited under the Commerce Clause to the Constitution. U.S. Const. art. I, § 8, cl. 3. The district court found there was no violation of the Commerce Clause and the Ninth Circuit declined to reach the issue because it found preemption. *Federal Express v. Public Utils. Comm'n*, 936 F.2d 1075, 1077 (9th Cir. 1991). In effect, however, a close analysis of the Circuit Court's opinion shows that its decision to preempt state regulation of Federal Express' intrastate motor carrier service was based upon an abbreviated and perfunctory Commerce Clause analysis. Thus, it first decided that Federal Express was an air carrier whose operations were "integrated". It then reasoned that state regulation of any activity engaged in by Federal Express would amount to an improper interference with an inte-

grated interstate air operation. While the Circuit Court used a preemption label, its analysis and ultimate conclusion was based upon Commerce Clause considerations and was unrelated to the concept of federal preemption.[2] Federal preemption, of course, is a separate and distinct subject and does not involve a factual analysis, as does the Commerce Clause, as to whether state regulation improperly burdens interstate commerce.[3]

It is clear that not only did the Circuit Court misconstrue the statute and Congress' intent[4] but it also confused two unrelated concepts, namely Commerce Clause issues and federal preemption issues. The dissent recognized the majority's confusion: "To accept this argument is to confuse Federal Express' other commerce clause arguments with its preemption arguments." *Federal Express v. Public Util. Comm'n*, 936 F.2d 1975, 1081 (9th Cir. 1991).

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[2] The Ninth Circuit's confusion and reliance upon Commerce Clause considerations is further evident from its reasoning that California was preempted from regulating Federal Express' intrastate trucking service because such state regulation was "economic" in nature. In the Ninth Circuit's view any state regulation that economically impacted one part of Federal Express' integrated operations, even though it may be remote from the air transportation services, would ultimately impact and interfere with interstate commerce.

[3] Had the Circuit Court fully and properly considered the issue within the framework of the Commerce Clause, as the district court did, and applied the proper legal test therefor as set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), it would have concluded that California's regulation of the intrastate trucking operations of Federal Express was perfectly consonant with the requirements of the Commerce Clause.

[4] In effect, the "economic" test adopted by the Ninth Circuit leads to the absurd conclusion that any regulation of Federal Express which impacts the company's profits must be deemed preempted. This would mean, for example, that a state tax on the real or personal property of Federal Express would be preempted because it constituted economic regulation. This is certainly far beyond what Congress had in mind in deregulating airlines.

The Supreme Court should grant the petition to remedy this misguided analysis and therby avoid unwarranted confusion between the Commerce Clause and federal preemption.

II. THE NINTH CIRCUIT'S DECISION WILL LEAD TO UNNECESSARY LITIGATION, CHAOS AND CONFUSION

In light of the Ninth Circuit decision, Federal Express and other similarly situated entities, will seek to preclude other states from regulating their intrastate motor carrier activities.[5] The states, on the other hand, are sure to resist these efforts. Indeed, forty-two states currently regulate intrastate operations of motor carriers and despite requests to do so over the last several years, many state governments have refused to enact legislation to deregulate intrastate motor carrier service. Baker, *1990 Summary of Motor Carrier Regulations of the Respective States of the United States* XL Your Letter of the Law 13 (Transportation Lawyers Ass'n 1991).

The outcome of these conflicting interests will inevitably be an abundance in litigation around the country as courts are used as battlegrounds by those businesses qualifying as air carriers who are seeking to divest states of their traditional roles in regulating motor carrier operations within their boundaries. These businesses will attempt to avoid state regulation of their motor carrier activities solely on the basis that their motor carrier service is provided by an air carrier as part of an "integrated" operation. The lower courts inevitably will struggle to define the scope of an integrated operation and

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[5] It has been and continues to be a goal of Federal Express to achieve full deregulation of all its motor carrier operations. Federal Express has tried to achieve this through Congress, but has hitherto failed. *See* Safe and Competitive Trucking Act, H.R. 4261, introduced in the 101st Congress, 1st Session (1990). It is now attempting to achieve its goal using the courts.

will reach varied and confusing results. There will be no understanding or agreement with regard to the meaning of section 1305(a)(1).

Indeed, the existing case law pertaining to section 1305(a)(1) already is in a confused state. On the one hand, this section has been narrowly interpreted so that state preemption of an activity will only be found if the activity is closely related to the rates, routes and services of the air carrier. For example, in *Air Transp. Ass'n of America v. Public Utils. Comm'n of California*, 833 F.2d 200, 207 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988), the same Ninth Circuit held that a California Public Utilities Commission regulation prohibiting telephone customers in California from surreptitiously overhearing or recording conversations without notice to the parties to the conversation was not preempted because the regulation did not relate directly or indirectly to rates, routes or services of the air carrier.[6] More recently, in *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (1991), the Ninth Circuit held that a state claim for breach of a covenant of good faith and fair dealing under Montana law brought by a passenger who was denied a seat on an overbooked flight was not preempted, because the use of the words "relating to services" in section 1305(a)(1) was not intended to encompass all state laws affecting airline services however tangentially. The court stated that to find preemption would result in an undue expansion of preemption and ignore the presumption against federal preemption in this traditional state law area. The court also noted that state laws that merely have an

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[6] *Air Transport Ass'n* 833 F.2d 200 (9th Cir. 1987), cannot be squared with the Ninth Circuit's decision in Federal Express. In both cases, the activities that were being sought to be preempted were not related to the air transportation of the airline. In that case, the Ninth Circuit found no preemption; yet, the same Court in *Federal Express* concluded that preemption did exist simply because the activities in question were provided by an air carrier. *See also West v. Northwest Airlines, Inc.*, 923 F.2d 675 (9th Cir. 1991).

effect on airline services are not preempted. Similarly, *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 635 F.2d 67, 74 (2d Cir. 1980), the Second Circuit held that a state claim under section 245(1) of New York's General Business Law which prohibited the operation of an aircraft in a careless and reckless manner was not preempted by section 1305(a)(1) on the grounds that the Airline Deregulation Act does not preclude common law remedies.[7]

On the other hand, other decisions give section 1305(a)(1) a more expansive interpretation. Thus, in *Trans World Airlines v. Mattox*, 897 F.2d 773 (5th Cir. 1990), the issuance of an injunction by a district court enjoining the state Attorney General of Texas from enforcing the state's deceptive practices laws against airline advertising on the grounds that such state laws "relate to" airline rates was upheld as being preempted by section 1305.[8] In *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984), a blind passenger brought a claim alleging that his rights to full and equal access under the California State Civil Code had been violated because he was required to occupy a bulkhead

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[7] *See also People of State of N.Y. v. Trans World Airlines*, 728 F. Supp. 162, 176 (S.D.N.Y. 1989) (section 1305(a)(1) did not expressly preempt New York law governing deceptive advertising). In other cases finding preemption of state law, it was clear that the activity involved pertained directly to air transportation. *See, e.g., O'Carroll v. American Airlines*, 863 F.2d 11, 13 (5th Cir. 1989), *cert. denied*, 490 U.S. 1106 (1989) (section 1305 preempted a ticket holder's state law claim for allegedly wrongful exclusion from the flight); *Anderson v. U.S. Air*, 818 F.2d 49, 57 (D.C. Cir. 1987) (state law obligation of an air carrier to give courteous service was expressly preempted by section 1305).

[8] This decision is patently in conflict with the decision of the Southern District Court of New York in *People of State of N.Y. v. Trans World Airlines*, 728 F. Supp. 162 (S.D.N.Y. 1989), where similar New York laws were held not to be preempted by section 1305. The conflict between these decisions is illustrative of the confusion that has arisen over the rationale to be applied in interpreting section 1305.

seat on an aircraft. The Ninth Circuit managed to extend the preemptive scope of section 1305(a)(1) by finding that the issue was not really one of equal access but pertained rather to the seating policies of the airlines. By way of this strained interpretation of the facts, the Ninth Circuit then reasoned that such seating policies related to the services of the airline and were thus preempted by section 1305(a)(1).

The foregoing demonstrates that there is considerable confusion in the courts (and within the Ninth Circuit itself) as to the scope of section 1305(a)(1) and the rationale that is to be applied in determining the range of its preemptive effect. This confusion will be further exacerbated by the multitude of law suits which are sure to follow on the heels of the *Federal Express* decision.

The confusion and consequent proliferation in litigation that is certain to follow as a result of the Ninth Circuit's decision is further compounded by the fact that the court provided no standard against which a state or a court can determine whether an entity flying aircraft as part of its operations provides an "integrated" air service. Yet, the Ninth Circuit based its decision that Federal Express' intrastate trucking activities were free from state regulation entirely on its finding that these activities were so integral a part of Federal Express' air transportation activities as to make Federal Express an "integrated" air carrier. The absence of a clear standard as to what constitutes an "integrated" air service can only result, as the dissent noted, in complete and utter chaos and confusion. *Federal Express v. California Public Utils. Comm'n*, 936 F.2d 1075, 1081 (9th Cir. 1991). Will a company operating a single Cessna be able to contend that the five hundred trucks it operates wholly within a state are exempt from state regulation because it provides an integrated air service?

Even when it is evident that a company is primarily engaged in the business of providing air transportation

services, the potential reach of the Ninth Circuit's decision is unclear and could lead to an absurd result. For example, if an airline owns a chain of hotels and that airline were to advertise and market a service that, for a fixed sum, provided air transportation and a hotel room, the airline could argue that its service was an "integrated" service and thus all aspects of its hotel business were exempt from any state economic regulation.[9] Whereas, it is, the IBT submits, absurd to conclude that a state is preempted from regulating various aspects of a hotel business operating within its borders, it is equally misguided to find that intrastate motor carrier services, not part of air transportation, are preempted from state regulation.

Given the current confusion and conflict between the courts and within the Ninth Circuit itself over the proper reach of section 1305(a)(1), and to avoid further unnecessary and wasteful litigation over this issue, the petition for certiorari should be granted. In *Nader v. Allegheny Airline, Inc.*, 426 U.S. 290 (1976), the Court held that the Federal Aviation Act of 1958 did not preempt common law remedies against an air carrier engaging in unfair or deceptive practices. Subsequent thereto, however, Congress enacted section 1305(a)(1) and thus *Nader* no longer can be relied upon with regard to the resolution of preemption issues. It is therefore important for this Court to revisit and clarify the scope of preemption in this area.

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[9] Federal Express in its Opening Brief before the Ninth Circuit (at page 38) conceded that "[t]he District Court was correct that at some point a service offered by an air carrier may become too remote from its core transportation function to fall within the preemption protection of § 1305(a)(1)." In its Reply Brief (at page 15) Federal Express further conceded that ". . . some cases might present the Court with a difficult line drawing problem".

III. THE NINTH CIRCUIT'S DECISION BRINGS UNCERTAINTY AND CONFUSION TO THE AREA OF LABOR LAW

In concluding that Federal Express was an "integrated" air carrier and thus its intrastate motor carrier service was not subject to state regulation, the Ninth Circuit has brought confusion to an area of labor law where none existed before. Hitherto, in accordance with well-established precedent, the National Mediation Board ("NMB") and the National Labor Relations Board ("NLRB") have determined whether the RLA or the NLRA governs the organization of the labor-management relations of businesses. Generally, when such jurisdictional issues arise, the relevant board will first determine if the operations of a business are "integrated". This is important because if the business is deemed to be an integrated air operation, the RLA would apply, whereas if it is not integrated, the airline service would be subject to the RLA but the ground service would be governed by the NLRA. *Flight Terminal Sec. Co.*, 16 NMB 387, 397 (1989); *Olympic Sec. Servs., Inc.*, 16 NMB 277, 282 (1989); *Globe Sec. Sys. Co.*, 16 NMB 208, 213 (1989); *CFS Air Cargo, Inc.*, 13 NMB 369 (1986). These two labor statutes are quite different. Among other things, the RLA requires that a bargaining unit be done on a systemwide basis, (45 U.S.C. § 152 Ninth; *Union Pacific Railroad System*, 18 NMB 516 (1991); *Burlington Northern Railroad*, 18 NMB 240 (1991); *Atchison, Topeka and Santa Fe Ry. Co./Russell*, 12 NMB 95, (1985); *Varig Airlines*, 10 NMB 223, 224 (1983)), whereas the NLRA does not have such a requirement.

In determining if a business is integrated, both the NMB and the NLRB take into account a host of factors. They will look to see if the various components of the business are separately managed or whether they have shared directors, officers and management personnel; if the labor relations and personnel functions are different

with each component having its own payroll, salary and compensation policies; if the uniforms worn are different or if the holidays, sick leave policies, employment applications, employee credit unions or even the labor counsel are different. These federal labor agencies will further look to see if there is cross-utilization of employees or equipment and if the bank accounts, accounting and computer systems are different. The advertising and marketing functions will also be examined to determine if they are separate. *CFS Air Cargo, Inc.*, 13 NMB 369 (1986) and *Allied Aviation Serv. Co.*, 11 NMB 239 (1984). The analysis involved is thus a far-reaching and detailed exercise.

By determining that Federal Express' motor carrier activities are integrated with its air carrier operations without any regard for the traditional role played by the labor boards in making such determinations, and without any consideration of the factors typically considered by them, the Ninth Circuit has created uncertainty and confusion. This decision will be relied upon, improperly in the IBT's view, in future disputes over the appropriate labor statute that is to apply to a given operation. To avoid this decision potentially disrupting well accepted and established principles in this area of labor law, the petition for certiorari should be granted.

IV. THERE IS CONSIDERABLE INTEREST IN SECTION 1305(a)(1) OF THE AIRLINE DEREGULATION ACT

The measure of interest in the scope of section 1305 (a) (1) is demonstrated by the fact that this issue has already been the subject of various cases decided by a number of Circuit Courts around the country. Moreover, there is currently pending before the Supreme Court a petition for a writ of certiorari in Docket No. 90-1606. In this petition, the Attorney General of Texas, supported by the Attorneys General of thirty-one other states as amici curiae, requests that the Supreme Court

reverse the decision of the Fifth Circuit Court of Appeals in *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir. 1990), which held that section 1305(a)(1) exempts airlines from the application of state false and deceptive advertising laws.

Although the petition in Docket 90-1606 is worthy of consideration by the Supreme Court, the IBT submits that this case merits the attention of the Supreme Court even more. This is so because the issue in our case does not involve activities that can even arguably be said to qualify as services of an airline related to its air transportation operations. The intrastate transportation of packages by truck that never see the inside of an airplane clearly do not relate to either the "rates, routes, or services" of an airline. This case therefore presents the issue of whether activities provided by an air carrier, which are wholly unrelated to its air services, are to be exempted from state regulation under section 1305(a)(1). This issue is not clearly presented in Docket 90-1606.

CONCLUSION

A writ of certiorari should issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Of Counsel:

JAMES T. GRADY
General Counsel
JAMES A. MCCALL
Associate General Counsel
THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 Louisiana Avenue, N.W.
Washington, D.C. 20001

STANLEY O. SHER *
MARC J. FINK
SOVAIDA MA'ANI
SHER & BLACKWELL
1255 Twenty-Third St., N.W.
Suite 500
Washington, D.C. 20037
(202) 857-2990
Counsel for Amici Curiae

* Counsel of Record